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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DERRICK BROWN,

Petitioner,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E062550
(Super.Ct.No. RIF1400959)

OPINION

PATRICIA BROWN,

Petitioner,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent,

THE PEOPLE,

Real Party in Interest.

E062553

(Super.Ct.No. RIF1400959)

ORIGINAL PROCEEDINGS; petitions for writ of mandate/prohibition. Dale R. Wells, Judge. Petitions are denied.

Steven L. Harmon, Public Defender, Laura B. Arnold and Richard C. Verlato, Deputy Public Defenders, for Petitioner Derrick Brown.

Rodney L. Soda; and Taylor Huff for Petitioner Patricia Brown.

No appearance for Respondent.

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Real Party in Interest.

In these matters we have issued orders to show cause in obedience to an order from our Supreme Court—an order that issued in regard to petitioners' petitions for review following our summary denial of the petitions for writ of mandate/prohibition filed in this court. We have reconsidered the matters and confirm our earlier conclusions. We will deny the petitions.

STATEMENT OF THE CASE

Derrick Brown and his wife Patricia (petitioner or petitioners; in the interest of clarity we may in some instances refer to petitioners by their first names) are jointly charged with murder and child abuse. (Pen. Code, §§ 187, 273a, 273ab.)[1] The victim was Derrick's son, Deetrick. Derrick and Patricia brought separate motions to dismiss

[1] All subsequent statutory references are to the Penal Code.

the indictment (§§ 939.71, 995), which the trial court denied. These proceedings followed.[2]

We begin by summarizing the evidence presented to the grand jury that supports the indictment. Because the sufficiency of the evidence on its own is not a primary issue we need not go into extensive detail but will set out only so much of the evidence as, in our view, supports the grand jury's decision.

Derrick's two-year-old son Deetrick died while in the custody of defendant and his wife Patricia. Deetrick, the product of an extramarital affair conducted while Derrick and Patricia were temporarily separated, was placed in protective custody when his mother was unable to care for him. At that time he was in good health and described as "chubby."

Deetrick was placed with Lilly, who wished to provide a permanent home for him and in fact adopted his three half siblings. While in Lilly's care, he slimmed down but was still within normal weight ranges. His only medical issue was a bout of eczema. He behaved as a happy, normal child.

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[2] At oral argument, counsel for Patricia complained that the opinion, as tentatively drafted, focused on the arguments as made by Derrick. This is the result of our somewhat tardy decision to consolidate the matters for decision after the tentative opinion in Derrick's case had been completed. It does not reflect any belief that Patricia's arguments are less important or less deserving of attention. We regret any clumsiness in the result, but we believe that we have adequately addressed the claims of both parties.

Eventually authorities contacted Derrick, possibly in regards to child support. Derrick decided instead to take Deetrick into his home. Patricia, who had reservations and concerns over her ability to deal with another child, agreed.

During his relatively brief time with the Browns, Deetrick lost weight to the point of appearing "undernourished" to medical personnel. Patricia described him as a little bit slow, retarded, or showing autistic features. He allegedly demonstrated peculiar behaviors such as sitting in a closet or corner for long periods. He suffered a serious injury to his hand a few months after being placed with the Browns. The Browns explained the injury by saying that Deetrick had picked obsessively at a minor sore or wound. Deetrick's medical provider believed it was a burn injury. Before the grand jury, the People's expert also opined that the injury resulted from a severe immersion burn.

Both child protective services (CPS) personnel and Deetrick's medical provider observed that Deetrick was comfortable with Derrick but resisted being held by Patricia, or in other ways manifested a noticeably lower comfort level with her. Patricia expressed no emotion when discussing Deetrick's death.

Patricia reported that Deetrick began having seizures, and he was taken to John F. Kennedy Memorial Hospital in November and December 2002. In both instances CAT scans were done that at the time were read as normal, but which an expert who viewed the scans after Deetrick's death determined to show fresh bleeding in the brain. A doctor who performed an autopsy on Deetrick also found evidence of fresh bleeding, which he attributed to a new injury. The People's expert, who testified before the grand jury,

testified that seizures could be caused by bleeding in the brain, but that seizures did not cause such bleeding. This witness also gave the opinion that the brain injury was caused either by shaking Deetrick or slamming him into a soft object like a mattress.

Deetrick continued to have seizures following his second hospital visit in December 2002 and was not taken for medical attention. Although Patricia later said that Deetrick's medical professional told them not to call for medical aid unless the child stopped breathing during a seizure, the medical provider indicated that he never gave such advice.

Approximately a week after his last medical visit, Deetrick had another lengthy seizure. Later in the same day, he had yet another seizure and stopped breathing. He was taken to Loma Linda Hospital, where he died.

By the time of his death, Deetrick also had bruises, scars, and healing scratches all over his body, including his back.[3] The Browns had previously told medical providers that Deetrick had been a "drug baby," had been abused while in foster care, and was mentally retarded. CPS personnel and his foster mother provided ample evidence from which it could be concluded that these claims were false.

Derrick and Patricia were originally charged at that time, but the case was dismissed after the preliminary hearing. The magistrate was persuaded by the testimony of Dr. Ronald Gabriel, who testified that Deetrick's seizures were the result of brain

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[3] His foster mother's distress at seeing photos of his body is evident. "That Deetrick's face, but this body—what happened? No, this is not my Deetrick, the way he left me, no. What happened? No."

atrophy resulting either from an organic condition, his mother's purported drug use, or previous abuse. At the preliminary hearing the magistrate found Dr. Gabriel's testimony overwhelming on the side of causation (or lack of causation). (At the hearing on the instant motion, the prosecutor conceded that Dr. Gabriel had not been effectively cross-examined.)

However, having developed new medical evidence, the People re-filed the charges in February 2013 and the subject grand jury proceedings ensued.

In their motions to dismiss in the current case, the Browns raised numerous and largely identical issues relating to the prosecutor's alleged failure to inform the jury about potentially exculpatory evidence. The prosecutor's response effectively rebutted many of the claims, but the trial court did find certain errors and omissions on the part of the prosecutor. Petitioners now focus upon these issues, which the court in the end found insufficient to require dismissal. They then rely upon the omissions to show either a statutory violation or a constitutional violation through interference with the grand jury's opportunity to act independently. Petitioners also argue instructional error, the use of inadmissible evidence, improper manipulation by the prosecutor, and insufficient evidence.

We will first discuss in some detail the evidence omitted, or claimed to have been omitted, and once the framework has been established we will consider the legal claims made by petitioners.

THE EXCULPATORY EVIDENCE ALLEGEDLY WITHHELD

Unlike a case initiated by a preliminary hearing, when a prosecutor chooses to proceed before a grand jury the defendant has no opportunity to participate or present witnesses. However, section 939.71 imposes upon the prosecutor a duty to inform the grand jury of exculpatory evidence of which the prosecutor is aware. Failure to do so is grounds for dismissal *if* the failure causes "substantial prejudice."[4] This statute was enacted to codify the holding in *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 255 (*Johnson*), that section 939.7 must be read to include a prosecutorial duty to disclose the existence of exculpatory evidence in order to allow the grand jury to intelligently exercise its right to order the production of evidence of which it would otherwise be ignorant. Although in *Johnson* the evidence known to the prosecutor was the defendant's own testimony given at a preliminary hearing—which had led to a refusal by the magistrate to hold him to answer[5]—the court also cited *In re Tyler* (1984) 64 Cal. 434 (*Tyler*) for the principle that a defendant has a right to present exculpatory evidence to the grand jury by letter. (*Johnson*, at p. 254.)

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[4] The section reads in pertinent part "(a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7." The latter statute provides that "[t]he grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced . . . ."

[5] In *Johnson*, the defendant testified at the preliminary hearing that he had arranged the drug transaction which was the subject of the prosecution in order to carry

[footnote continued on next page]

In this case, the prosecutor invited the Browns' attorneys to submit information concerning exculpatory evidence, and counsel for both Derrick and Patricia did so. Derrick's request was that the letter be given to the grand jury or that "all appropriate portions be read to the Grand Jury . . . ." (Underlining in original.) Patricia simply stated that her letter included "**additional** exculpatory evidence that should be brought to the attention of the grand jury." (Bold text in original.)

The prosecutor chose not to precisely comply insofar as either defendant asked that the letters be read verbatim, and instead presented most of the information contained in the letter in other ways. The trial court found several instances in which the prosecutor did *not* adequately inform the grand jury of the specific exculpatory evidence requested, as detailed *post*. However, it also found that the omissions were not substantially prejudicial.

We now briefly summarize the information found to have been omitted or inadequately conveyed to the grand jury. We first deal with the claims of Derrick, which were adopted by Patricia in her letter. We will then explain why we do not consider Patricia's separate claims in any detail.

First, Derrick asserts that a public health nurse had indicated to CPS that she saw no signs of abuse to Deetrick about a month before his death. However, the social worker investigating a report of possible abuse at that time testified that the matter was

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[footnote continued from previous page]
out an agreement with law enforcement to provide information in return for leniency in another case. The magistrate found this credible and dismissed the complaint.

closed as "inconclusive" *and* that during her visit to the Brown home they behaved appropriately and she had no tangible concerns about leaving Deetrick in the home. Hence, the grand jury was made aware that there was at least legally insufficient evidence of abuse at that point.

Next, Derrick asserts that Deetrick's complete medical records following his repeated hospitalizations for seizures should have been admitted to show that he had no reason to be aware of any abuse. These records showed that three CAT scans performed on Deetrick in November and December 2002, and then in January 2003, had all been interpreted by personnel at John F. Kennedy Memorial Hospital to have been normal. We agree that this evidence was exculpatory, but the jury learned through the testimony of a prosecution witness that all three CAT scans had been read as normal. Hence, the actual records would have been cumulative.

Derrick also complains that his complete work records were not shown to the grand jury to prove that he was at work when Deetrick suffered almost all of his seizures and during the period when the child's hand was injured. However, the prosecutor repeatedly conceded to the grand jury that petitioner was not at home when these incidents occurred, and there was also specific testimony to this effect.[6]

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[6] Derrick also contends that the grand jurors should have been made aware that he had a two-hour commute to his work place, which he argues would have tended to show that he was reasonably ignorant of the abuse. But Derrick does not contend that he was away from the home on weekends or holidays, so that he had ample opportunity to observe the injuries to Derrick whatever his work schedule. He was also fully aware of Deetrick's repeated doctor visits.

The next "omitted" item is the opinion of Dr. Omalu to the effect that Deetrick's death was not related to current abuse and that the evidence did not support a conclusion of "abusive head injury," as was testified to by the prosecution's evidence. However, the prosecutor did tell the grand jury that Dr. Omalu believed that Deetrick's death was possibly the result of "remote" or "sub-chronic" history of child neglect and abuse.

Derrick wished to have the grand jury told that a Dr. Young believed that Deetrick's hand injury was accidental, which would support his claim of ignorance that the child was being abused. But as the People point out, Dr. Young believed that a *burn* injury had been accidentally caused; the Browns consistently claimed that Deetrick's hand had been injured when a door closed on it. They never claimed that the child had suffered an accidental burn.

Derrick then complains that the prosecutor did not call the expert who testified on his behalf in the first proceedings, Dr. Gabriel, or even introduce the entirety of his prior testimony. The grand jury was told of Dr. Gabriel's qualifications and his continued opinion that Deetrick's death was due to brain abnormalities, which were either congenital or caused by earlier neglect.

The next argument is that the prosecutor withheld "much evidence," information relevant to the *basis* for Dr. Gabriel's opinion and that of another physician, Dr. Nelson. He does not set out exactly what evidence of this nature was "withheld" and we decline to speculate.

Derrick's submission to the prosecutor briefly referenced his assertion that his elder daughter, Jasmine, was present on one occasion when Deetrick spontaneously went into a seizure—that is, suffering a seizure without any trigger of abusive head trauma, which prosecution witnesses testified probably caused the seizures. The only reference to anything of this nature came when Jasmine's presence during one seizure was discussed by the prosecutor and a witness.

At one point Deetrick was observed to have what appeared to be a bite mark on his chest. Derrick wanted the grand jury to be told of the observations of a deputy sheriff investigating the matter that the bite marks were small and appeared to be caused by a small child, thus refuting any inference that Derrick or Patricia inflicted the bite. But the grand jury was shown photographs of the bite, and one juror even commented that it "looked small," and asked if it could have been inflicted by a child. The prosecutor responded that the Browns had reported that one of the other children, Jeremiah, had bitten Deetrick.

Finally, Derrick asserts that the prosecutor should have informed the grand jury of an incident in which Deetrick's biological mother was observed to "drop" him from about a foot off the ground shortly after his birth, while being investigated by Los Angeles County CPS. In the absence of any evidence that Deetrick suffered any injury through this incident (which was ambiguously described in the reports), it is irrelevant. Similarly, any inconsistency in the evidence concerning whether or not Derrick told an

investigating detective that he was unaware of Deetrick's existence until contacted by CPS has no significant probative value either way.

As the foregoing lengthy summary makes clear, virtually all of the information which Derrick wanted the grand jury to know about was placed in front of the jury—if not necessarily in the precise form he desired.

Patricia raised several similar issues in her letter and some distinct matters. In her petition to this court, Patricia, unlike Derrick, did not set out the categories of evidence allegedly withheld or inadequately presented. Instead, she simply attempted to incorporate *147 pages* of briefs she filed below. She did this in a candid effort to comply with the "word count constraints."

We reject this effort and therefore deem any additional arguments in this respect waived as not having been raised in her petition. (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) We have no intention of guessing which points raised below Patricia intends to argue here, and it is similarly inappropriate to ask us to, e.g., "see pages 118-125 of the brief filed below." If she believed that her challenge to these additional rulings had any merit, she had more than ample opportunity to include them specifically in the petition.[7] (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 854 (*Serri*) ["[i]t is

[7] The People's return to the petition reflects a similar confusion or reluctance as it focuses on *Derrick's* claims rather than the matters in Patricia's letter.

inappropriate for an appellate brief to incorporate by reference arguments contained in a document filed in the trial court"].)[8]

In this regard we are encouraged in our strict approach by the fact that her petition for review again failed to set out for the Supreme Court's consideration the specifics of the "omitted" exculpatory evidence or its significance.[9] Hence, we may assume that the Supreme Court's concerns related primarily to at least one of the legal issues raised by Patricia rather than to the *minutiae* of omitted evidence.[10]

We now turn to the legal arguments.

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[8] We also stress that page and word count restrictions (see Cal. Rules of Court, 8.204(c), 8.486(a)(6)) are not there to limit or restrict counsel. Rather, they are designed to encourage thoughtful editing and the omission of irrelevant, redundant, or repetitive argument and other material. A properly drafted brief of any length should assist the court in identifying and resolving the issues critical to the case.

[9] Derrick's petition for review *did* include this information and argument.

[10] In her traverse, Patricia asserts that "the Supreme Court granted review on seven distinct 'questions presented.' " The Supreme Court did no such thing; its order simply grants review, transfers the matter back to this court, directs us to vacate our denial and to issue an order to show cause. Unfortunately, although we do not at all believe that the Supreme Court thought that *all* of the "questions presented" had merit or needed to be addressed in detail, the cryptic nature of the order requires us to consider at least those questions that were expressly presented to the Supreme Court.

DISCUSSION

A.

It appears that the foundation for most of Derrick's contentions is his position that the prosecutor was obliged to give his *exact communication* to the grand jury, complete with attachments.[11] We disagree. Nothing in *Johnson* allows the defendant to determine the form in which exculpatory evidence is presented.

Johnson cited *Tyler, supra*, 64 Cal. 434 which is in fact instructive. In that case, the petitioner, an attorney, sent a letter to the grand jury containing "severe and opprobrious language upon the conduct and integrity of the jurors," accusing them of having been corrupted and bribed. (*Id*. at p. 435.) In holding this conduct sufficient to support a contempt finding, the court acknowledged that "[u]nquestionably, the fact of the existence of exculpatory evidence may be brought by any citizen to the attention of the grand jury in a regular way," thus enabling the grand jury to order the production of such evidence. (*Id*. at p. 437.) *Tyler* actually holds that the form of a communication *is* relevant and at least implicitly recognizes that editing or modification may be appropriate. It would be nonsensical to hold that a defendant (or any citizen) has free rein to present evidence in a scurrilous, argumentative, or misleading manner.

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[11] As noted above, Patricia's letter did not contain any such express request, although in her briefs she argues that the trial court was "spot on" in finding the failure to transmit the actual letters to have been improper. In fact, at oral argument neither party strenuously urged this position. We discuss it in some detail, however, because we believe that this point may have been of interest to the Supreme Court, and influential in that court's decision to transfer the cases back to us.

Neither *Tyler* nor *Johnson* holds that a defendant may directly present evidence—only that the defendant, like any concerned citizen, has the right to inform the grand jury of the *existence* of exculpatory evidence, which then triggers the grand jury's authority under section 939.7 to "order the evidence to be produced." Indeed, the *Johnson* court recognized that in many cases, the subject of a grand jury investigation will be ignorant of the proceedings. (*Johnson, supra*, 15 Cal.3d at p. 255.) Thus, it is clear that there is no "right" to present specific evidence to the grand jury, because that "right" would inure only to those subjects who were aware that they were being investigated. The "right" is that the grand jury shall be informed, one way or another of the existence of potentially exculpatory evidence so that it can perform its duty of ensuring that only viable cases are prosecuted.

To the extent that the trial court may have agreed with defendant's position, we believe it was incorrect. Thus, a fundamental premise on which petitioners attempt to construct a showing of error and prejudice fails.

B.

In a somewhat related context, Patricia argues that the prosecutor's obligation to convey exculpatory evidence to the grand jury requires more detail than was provided in the instances we discussed above. Patricia can only cite the general statement in *Johnson* that the prosecutor must " 'fully and fairly present to the court the evidence material to the charge.' " (*Johnson, supra,* 15 Cal.3d at p. 255.) But in the grand jury context, as we have explained, *Johnson* only requires the prosecutor to inform the grand jury of the

"nature and existence" of exculpatory evidence (*ibid*.), as codified in section 939.71. Although Patricia asserts that it is "obvious" that the prosecutor's duties must include the presentation of detailed information, no authority for such a principle is cited, and we reject it. The obligation is to inform the grand jury of the "nature and existence" of exculpatory evidence. If the prosecutor had an obligation to present (for example) all of Dr. Gabriel's testimony to the grand jury, there would be no need or reason for section 939.7 to give the grand jury the power, or option, to order the additional evidence to be produced. As we noted above, the grand jury was told that Dr. Gabriel's opinion was that Deetrick's death was not caused by abuse. It was up to the grand jury to pursue this if it felt that further details might influence its decision on indictment.

To create a homely metaphor in the tradition of the "ham sandwich" comments,[12] when it comes to criminal proceedings before the grand jury, the prosecutor drives the car.[13] However, he or she must provide the grand jury with a road map showing not only his or her intended destination, but other routes, points of interest, and roadside attractions that might indeed lead somewhere else entirely. The grand jury has full discretion as to which of these diversions, if any, it wishes to pursue. It may just "go

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[12] *McGill v. Superior Court* (2011) 195 Cal.App.4th 1454 (*McGill*) contains an extensive review of the historic and current role of the grand jury. In doing so, it quotes the "maxim that a grand jury would indict a ham sandwich if asked to by a prosecutor." (*Id*. at p. 1498.)

[13] This statement should be understood as limited to criminal proceedings instigated by the prosecutor; in its independent investigations or examination of government function, of course, the grand jury exercises far more control.

along for the ride" or it may direct the prosecutor on any detour it thinks advisable in the performance of its duty. In this case, the exculpatory road map was given to the jury. The prosecutor's duty was thus discharged.

C.

Both Derrick and Patricia complain that the overall conduct of the proceedings made it impossible for the grand jury to perform its duty to ensure that the prosecutor did not overreach and that only meritorious prosecutions were approved. (*Johnson*, *supra*, 15 Cal.3d at pp. 253-254; *McGill*, *supra*, 195 Cal.App.4th at p. 1497.) We have no quarrel with this statement of the grand jury's role. However, Derrick's focus remains on the failure to deliver the entirety of his communication to the grand jury. In his view this prevented the grand jury from independently evaluating the evidence. Indeed, he states that "it would appear that [the prosecutor's] severe curtailing of the rights of the citizenry of California to bring matters to the attention of the grand jury is at least as nullifying as was the prosecutor's actions in *Johnson*." This, of course, is unwarranted hyperbole. As our discussion of *Johnson* above makes clear, in that case the prosecutor concealed the entire defense version of the case from the grand jury. Here, as our discussion also makes clear, the prosecutor informed the grand jury of virtually every point of potentially exculpatory evidence, including substantial medical evidence that Deetrick's death was

not the result of neglect or abuse. This situation is not remotely comparable to that in *Johnson*.[14]

Patricia, more or less under this heading, argues that the prosecutor further hampered the grand jury by the sequence of its instructions. ("To make matters worse . . . .") She notes that section 939.71 provides that once the prosecutor has informed the jury of exculpatory evidence, it "shall inform the grand jury of its duties under section 939.7 [to order the evidence produced]." Here, the prosecutor *first* instructed the jury on its powers to have evidence produced, and *later* recited the exculpatory evidence as required by section 939.71. She argues that if the *power to have produced* instruction had been read *after* the exculpatory evidence was described, the grand jury would have been more likely to use section 939.7. This is pure speculation; we will not assume that the grand jurors were incapable of remembering what they had been told a few minutes before being informed of the exculpatory evidence. We disagree with the assertion that the timing of the instructions is crucial.

D.

Both Derrick and Patricia argue that the prosecutor's alleged failures and concealments violated due process. However, under section 939.71 dismissal is only required if an omission results in "substantial prejudice." We think it clear from our

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[14] Derrick refers to the suppression of Dr. Gabriel's actual recorded testimony, but as we have determined, the prosecutor had no duty to provide the actual testimony. The People's only obligation was to inform the grand jury that this evidence existed and was available for its further exploration.

summary that the gist of virtually all the information that the Browns wished to present was in fact provided to the grand jury and that any omissions did not cause substantial prejudice. There is no reasonable probability that, if informed of the relatively limited and minor actual omissions, the jury would have declined to issue an indictment. (*People v. Becerra* (2008) 165 Cal.App.4th 1064, 1070.)[15] Once again Patricia argues that the prosecutor's description of the exculpatory evidence, in particular the favorable opinions or statements of medical experts, should have included more factual details. Again, we disagree.[16]

Derrick argues that there is some more stringent standard with respect to evaluating conduct on the part of the prosecution that undermines the grand jury's ability to protect the subject of the investigation compared to conduct that affects the grand

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[15] For the reasons given earlier, this comment is directed primarily to the items of evidence that Derrick claims were omitted. In fact, although set out at greater length, Patricia's categories of exculpatory evidence were substantially similar. To the extent that they diverged, Patricia was not harmed by any omissions. For example, Patricia wished to have the grand jury told that Deetrick's birth mother was a liar. There was little relevance to such evidence as the birth mother's testimony was not particularly inculpating as to the Browns. Patricia also wanted to have the grand jury informed that Deetrick was withdrawn in her presence because she reminded the child of his abusive birth mother. This is both speculative as to Deetrick's feelings and inaccurate; there was no evidence that the birth mother was actively abusive to Deetrick.

[16] Patricia also asserts that it was unfair for the prosecutor to have elicited comments from her medical experts that were critical of doctors who (as the grand jury was informed) would express views favorable to petitioners on the issues of causation and abuse. It may be true that it was impolitic for the prosecutor to ask her witness, for example, whether Dr. Gabriel knew what he was talking about, resulting in the answer "No." However, the prosecutor acted reasonably in eliciting testimony that explained why (in the witness's view) Dr. Gabriel, for example, was wrong.

jury's ability to evaluate probable cause. However, *People v. Backus* (1979) 23 Cal.3d 360 (*Backus*), which he cites, does not support this proposition. *Backus* recognizes that the due process clause applied to grand jury proceedings. (*Id*. at pp. 392-393.) However, in applying a simple "prejudice" test where the grand jury's probable cause finding was based on inadmissible evidence, it clearly suggested, or assumed, that the same test applied to the question of whether prosecutorial conduct inhibited the grand jury's independent, protective role. (*Ibid.*) And in *Berardi v. Superior Court* (2007) 149 Cal.App.4th 476, 492, the court, after noting the statutory "substantial prejudice" standard in section 939.71, also pointed out that due process violations do not automatically lead to dismissal absent prejudice. In other words, in our view the grand jury's role in protecting a defendant from unjustified prosecutions cannot be separately analyzed from its duty to indict only on probable cause. The same standard of prejudice, *significant* prejudice, applies.

E.

The next category of arguments relates to the instructions given to the grand jury. Both petitioners argue that they are entitled to dismissal because the prosecutor misinstructed the grand jury. While we find some errors in the instructions, none were prejudicial or otherwise require dismissal.

First, Patricia complains that the trial court adopted a "minimalist" approach to instructing the jury and never specifically told it that it could request advice from the judge; further, that the trial court did not explain the grand jury's "independent and

protective" role. No authority is cited requiring an "expansive" approach or the specific instructions desired by Patricia. Section 914 simply requires the trial court to "give the grand jurors such information as it deems proper, or as is required by law, as to their duties, and as to any charges . . . ." Next, Patricia complains that the prosecutor told the jury not to make any independent inquiry. (See CALCRIM No. 201.) We agree that it might have been wiser not to make a statement which (however proper with respect to a petit jury) arguably could have encouraged the grand jurors to take a passive role. However, in context we believe that the comments were more reasonably understood as telling the grand jurors not to go rummaging around unsupervised in possibly inappropriate areas.

Third, using the phrasing of section 939.7, the prosecutor informed the grand jury that if "it has reason to believe that other evidence within its reach will explain away the charge, it may order the evidence to be produced . . . ." As the Browns point out, the statute uses the mandatory "shall" rather than the permissive "may." But section 939.7 has not been interpreted to strictly require the grand jury to follow up on every avenue of potentially exculpatory evidence that may come to its attention. Instead, the grand jury has *discretion* to summon additional witnesses or seek out additional evidence. (*People v. McAlister* (1976) 54 Cal.App.3d 918, 926-927 (*McAlister*); see *Johnson*, *supra*, 15 Cal.3d at p. 255.) As the court noted in *McAlister*, grand jury proceedings would be absurdly prolonged and needlessly complicated if the grand jury could not return an

indictment until every possible defense witness had been called and every shred of potentially exculpatory evidence had been examined.[17] (*McAlister, supra,* pp. 926-927.)

Petitioners rely on *McGill, supra,* 195 Cal.App.4th 1454 and language that criticizes the conduct of the grand jury in that case for not recalling a witness—*not* the subject of the original investigation—whom it (as urged by the prosecutor) decided to indict for perjurious testimony before it. (*Id*. at pp. 1504-1506.) The *McGill* court did *not* hold that the grand jury's failure to pursue exculpatory evidence *necessarily* requires dismissal. In fact, it expressly acknowledged that it is usually up to the grand jury itself to determine whether there is " 'reason to believe' " that the potential evidence will explain away the charges. (*Id.* at p. 1506.)

Further, *McGill* does not even hold that the grand jury's failure to pursue potentially exculpatory evidence *ever* justifies dismissal. *McGill* was a case that the court itself described as "a bit shocking" (*McGill, supra,* 195 Cal.App.4th at p. 1472) in which the prosecutor's decision to pursue a perjury charge against the witness seemed arguably more tactical than in good faith; the prosecutor also *affirmatively* discouraged the grand jury from examining a witness who might have exculpated the perjury defendant. (*Id*. at pp. 1505, fn. 31, & 1499-1504.) The court was also concerned by the fact that when a witness who testifies before the grand jury is indicted for perjury by that same grand jury

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[17] Patricia argues that this statement is dicta. We are not persuaded; the issue of whether or not the grand jury has an *obligation* to seek out exculpatory evidence was distinct from the primary issue in *McAlister*—whether *Johnson* was retroactive. If the comments *are* dicta, we find them persuasive.

based on allegedly false testimony, that witness/defendant never has the right or opportunity to proffer exculpatory evidence under *Tyler*. (*McGill*, *supra*, at p. 1512.) Finally, the *McGill* court concluded that a grand jury that indicts for perjury committed before it is unlikely to start the matter from a neutral position. (*Id*. at p. 1510.) It was in light of *all* of these issues of unfairness that the court ordered the charge against the witness dismissed.

Hence, in this case the jury was not substantially misinstructed as to its duties.

Patricia then argues error on the prosecutor's behalf in instructing the jury on the standard of proof. The prosecutor used the term "strong suspicion" and in fact told the grand jury that "probable cause" was not the standard. This was incorrect; the two terms may be used interchangeably in this respect. (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1029 (*Cummiskey*).) The prosecutor also erred in telling the grand jury that "strong suspicion" was a *lower* standard than "probable cause."

Because the two terms are legally and logically equivalent, the grand jurors may have been somewhat perplexed by the prosecutor's statement. However, as "strong suspicion" is an appropriate formulation of the standard, there was no prejudicial error and dismissal is unwarranted.[18]

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[18] Of course the Browns' primary problem—and perhaps their real grievance—is that despite being made aware of potentially exculpatory evidence, the grand jury simply failed to exercise its right to pursue any of it. It did not request to hear from Dr. Omalu or Dr. Gilbert. It did not seek to see Derrick's work records or Deetrick's medical records. Of course we do not suggest that the grand jury in this case would have docilely indicted the proverbial "ham sandwich" if encouraged to do so by the prosecutor. (See *McGill*, *supra*, at p. 1498.) We assume, rather, that it carefully considered the effect of

[footnote continued on next page]

F.

Derrick then argues that Dr. Gleckman, a People's expert, improperly testified to the contents of other doctors' reports as inadmissible hearsay. Any such error would be subject to a prejudice analysis under *Backus, supra*, 23 Cal.3d 360. However, there was no error. Dr. Gleckman was asked about the reports of Dr. Gabriel and Dr. Omalu—reports that petitioner has earlier argued should have been presented as favorable evidence! Furthermore, the excerpts to which the prosecutor referred were obviously not introduced for their truth—the essential fault or risk addressed by the hearsay rule. Accordingly, they were not even hearsay. (Evid. Code, § 1200; *People v. Harris* (2013) 57 Cal.4th 804, 843.)

People v. Campos (1995) 32 Cal.App.4th 304, cited by Derrick, is not apposite. In that case, unlike this one, an expert witness testified to the contents of reports by other experts to *corroborate* her opinion. While acknowledging that expert witnesses may rely upon reports by other experts in forming his or her opinion, the court explained that the *contents* of such reports should not be discussed because in such a case the party as to

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[footnote continued from previous page]
the evidence to which the prosecutor referred under *Johnson* and concluded that further investigation would not affect its decision to indict. While both petitioners argue that the prosecutor invidiously encouraged the grand jury in this respect, such claims depend largely on nuances of expression, tone of voice, and body language as to which the record is necessarily silent. As we have found, the record itself reflects no prejudicial improprieties on the part of the prosecutor.

whom the contents are adverse has no opportunity to cross-examine those experts. (*Id*. at p. 308, citing *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894.)[19]

Patricia makes similar claims, although as noted above we do not inquire further into statements in her brief such as "*In the briefing below* the defendants identified a great deal of evidence that was offered in violation of the Evidence Code . . . ." (Italics added.) In general she appears to object to the introduction of certain medical reports, as does Derrick, but without additional explanation *in the current brief*, we decline to search for her claims. Nor, in any event, is there any persuasive argument that any additional hearsay rose to the level of prejudice contemplated in *Backus*.

G.

The last issue raised by the Browns is sufficiency of the evidence. As noted above, the standard applicable both to preliminary hearings and proceedings before a grand jury is whether the evidence is sufficient to create a "strong suspicion" or "probable cause" to believe that a crime has been committed and that defendant is guilty of it. (*Arteaga v. Superior Court* (2015) 233 Cal.App.4th 851, 862-863, citing *Cummiskey*, *supra*, 3 Cal.4th at p. 1025.)

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[19] Derrick also argues that the trial court improperly rejected his other claims of inadmissible evidence, directing our attention to his trial court paperwork. We generously permitted Derrick to file a petition of over 22,000 words—50 percent more than the limit specified in California Rules of Court, rules 8.204(c), 8.486(a)(6). If Derrick believed that his challenge to these additional rulings had any merit, he had more than ample opportunity to include them specifically in the petition. We decline to scour the record to track down his additional points of argument. (See *Serri*, *supra*, 226 Cal.App.4th at p. 854 "[[i]t is inappropriate for an appellate brief to incorporate by reference arguments contained in a document filed in the trial court"].)

With respect to Patricia, we think the argument is clearly untenable. There was substantial, persuasive evidence that Deetrick was a healthy child when he entered the Browns' home. At the time of his death he had suffered multiple inflicted injuries, all or virtually all of which appeared to have been suffered when he was solely in Patricia's care. There was evidence that Patricia resented the child and that he was frightened, or at least wary, of her. Once the grand jury accepted the medical evidence that Deetrick's injuries were neither accidental nor idiopathic, its conclusion that Patricia was likely personally responsible was almost inevitable.

As for Derrick, there is no legal obligation that a parent use heroic measures to protect a child, but every parent has a duty to take *reasonable* measures to prevent injury to the child. (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 746.) In this case, Deetrick came into the Brown home as a normal toddler in good health. Within weeks he was losing weight, becoming withdrawn, and sporting burns, bruises, and cuts over his entire body. He then developed repeated seizures.

Although Derrick in some instances participated in obtaining medical care for the minor, he cooperated with Patricia in painting an inaccurate picture of the child's history and health with the apparent motive of diverting official inquiry. He must have known that Patricia was abusing the child and that her abuse put Deetrick at risk of a final, fatal injury. Derrick had the power to remove Deetrick from the "kill zone" at any time.

Instead, he left the home each day, leaving Deetrick helpless against Patricia's repeated abuse. Derrick's precise intentions and state of mind are for the jury to resolve.[20]

DISPOSITION

The petitions are denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

MILLER
J.

[20] We have not addressed in the body of this opinion the argument that the prosecutor misused the term "*Johnson* rule" or "*Johnson*," in a manner that somehow "suggested to the grand jurors that the instruction entitled 'Johnson' gave them the **option** of evaluating the probative value of exculpatory testimony in this manner, rather than conveying the **duty** to call for the testimony of Gabriel, Omalu and others to make up their own mind." (Bold type in original.) First, as we have held above, the grand jury had no such duty and the prosecutor had no obligation to tell it that it did. Second, we do not understand from the cited examples how the shorthand "*Johnson*" references, used to explain to the jury why certain exculpatory evidence was being discussed, were misleading or improper. We also note that this argument directs our attention to "Footnote 47 of the defendants' reply in the trial court," which allegedly "follows each use by the prosecutor of the term 'Johnson.' " Again, under *Serri*, *supra*, 226 Cal.App.4th 830, we decline to go looking for "Footnote 47."